

FEB 20 2008

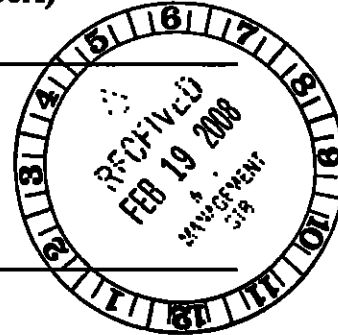
BEFORE THE
SURFACE TRANSPORTATION BOARD

Part of
Public Record

STB DOCKET NO. AB-6 (Sub- No. 430X)

221642

BNSF RAILWAY COMPANY
ABANDONMENT EXEMPTION
IN OKLAHOMA COUNTY, OK



RESPONSE OF EDWIN KESSLER TO

REPLY OF BNSF TO FEBRUARY 7, 2008 CHAIRMAN ORDER

1. Edwin Kessler ("Kessler"), herewith files this Response of Edwin Kessler to Reply of BNSF to February 7, 2008 Chairman Order
2. On February 7, 2008, Chairman Nottingham ordered BNSF to respond to Kessler's allegations that BNSF served shippers on the Line that is the subject of the above entitled proceeding, within the 2-year period prior to BNSF filing its Notice of Exemption, as well as more recently
3. In BNSF's February 12, 2008 Reply to Chairman Nottingham's Order, BNSF stated:
 - A. The last shipment made by BNSF on the Line was to Boardman, Inc. on August 1, 2003. February 12, 2008 Corrected V.S. of Lawrence E. Cole.
 - B. "No local traffic has moved on the line for at least two (2) years prior to the date hereof." September 22, 2005 V.S. of Richard A. Batie.
 - C. Producers' Coop is served from the Red Rock Subdivision. Unverified statement of Stephen Sergas, BNSF's terminal manager in Oklahoma City
 - D. There are no markings on Kessler's photographs "from which we can determine the photographs locations."
 - E. Item 5 of Thomas Elmore's Verified Statement has to do with the removal of a Union Pacific Diamond.

- F. The August 22, 2005 letter to Jim Hatt has nothing to do with this case, as it deals with a different track.

A. LAST SHIPMENT TO BOARDMAN COMPANY

4. **Boardman, Inc. is located at MP 541.75**, or some 1.5 miles west of Producers Co-Op Oil Mill (“Co-Op”), **which is located at MP 540.13**. The location of these two shippers is depicted on **Exhibit 4: Oklahoma Trackage**, which Exhibit Kessler appended to his March 21, 2007 Petition for Stay. Kessler does not have access to BNSF’s waybill documents. Consequently, he cannot verify the accuracy of Mr. Cole’s verified statement regarding the date when the last shipment to the Boardman Company was consummated. Since Kessler has not argued the Boardman Company was the last shipper on the Line to receive rail service, this piece of information, while interesting, does not resolve the issue before the Board. Has any shipper on the Line received rail service after September 23, 2003.

ADDITIONAL KESSLER EXHIBITS

5. Appended hereto are Kessler’s:

- A. **Exhibit 7: Track Diagram.** Depicted on this Track Diagram are. The North-South Red Rock Line; The East-West Line which is the subject of this proceeding (“Line” or “Frisco Line”); The location of the **signal box**, which has stenciled on its side: **MP 540.20**, which signal box is located just east of the Red Rock Line overpass, which is at MP 540.22. The location of the turnout, at MP 540.15, which connects the Frisco Line with the Red Rock Line, The location of the Co-Op turnout, at MP 540.13; the location of the Mid-States Lumber Company turnout, at MP 540.10, the location of the beginning point of the abandonment, at MP 539.96; the location of the west bank of the New Canadian river, at MP 539.26
- B. **Exhibit 8**, which depicts the location of rail lines in Oklahoma City;
- C. **Exhibit 9**, which depicts close-up views from images retrieved from www.MapsLive.Com. The copyright on the images indicates the images were taken in 2007. The top image clearly shows the turnout to a delivery ramp from the Red

Rock Line, was removed some time prior to 2007. The bottom image shows the turnout that connects the Frisco Line with the Red Rock Line, and shows the turnout that connects the Co-Op spur with the Frisco Line.

- D. **Exhibit 10**, which depicts images retrieved from the **Birds Eye** portal of www.Maps.Live.Com, for the location: 6 SE 4th St, Oklahoma City, Oklahoma. This Exhibit clearly shows the spatial relationships between the Red Rock Line, the Frisco Line, Union Pacific's line, and the turnouts located on the Frisco Line which connect the Frisco Line: To the Mid-States Lumber Company spur, at MP 540.10, To the Producers Co-Op spur at MP 540.13, To the Red Rock Line interchange track, at MP 540.15. This Exhibit also clearly shows the BNSF crossing Signal Box at MP 540.20, the elevated North-South Red Rock Line, the **absence** of a turnout that formerly connected the Red Rock Line to a ramp that serviced an unidentified shipper located north of the Producers Co-Op Mill, and the Producers Co-op Mill
- E. **Exhibit 11**, which depicts images retrieved from the **Aerial** portal of www.Maps.Live.Com, for the location: 6 SE 4th St, Oklahoma City, Oklahoma. This Exhibit shows the Red Rock ramp served an unidentified shipper north of the Co-OP, and further shows this ramp line **did not** connect to the Co-Op spur. The eastern portion of the image shows the Mid-States Lumber Company spur crossed the Union Pacific line at a diamond. This is the diamond BNSF refers to in **BNSF's August 22, 2005 letter to Jim Hatt**, Rail Programs Division, Oklahoma Department of Transportation, a copy of which was appended to Kessler's March 21, 2007 Petition to Stay. This aerial image clearly shows Mid-States Lumber **only had rail access from BNSF's Frisco Line**, which is the subject of this proceeding
- F. **Exhibit 12**, which depicts images retrieved from the **Birds Eye** portal of www.Maps.Live.Com, for the location: 6 SE 4th St, Oklahoma City, Oklahoma. The image in this Exhibit clearly shows the diamond, and approximately 100 feet of track north of the Union Pacific line, and approximately 400 feet of track south of the Union Pacific line, were removed sometime prior to 2007. This image shows the Union Pacific diamond and track material referred to in BNSF's August 22, 2005 letter to Jim Hatt, was in fact removed.

- G **Exhibit 13**, which are two photographs taken by Tom Elmore on February 14, 2008, which depict the **absence of any track material** on the ramp that previously served an unidentified shipper located north of the Co-Op. Evidently this track material was removed sometime after the Birds Eye image in Exhibit 10 was obtained, since the Birds Eye image in Exhibit 10 does show track material on the ramp.
- H. **Exhibit 14**, which are six (of 30) photographs taken by Tom Elmore on February 27, 2007. The first photograph depicts a BNSF consist on the Frisco Line at MP 540 20. (This MP number is stenciled on the Signal Box in the middle of the photograph.) The reader's attention is directed to the green BN (Burlington Northern) boxcar number BN 24 95 25, which is immediately adjacent to the Signal Box. Photograph two is a side view of BN 24 95 25, when it was astride the grade crossing. Photograph three shows the consist being pushed into the Co-Op facility. The end of BN 24 95 25 is visible on the right side of photograph three. Photograph four shows the consist on the Co-Op spur. The Signal Box at MP 540.20 is clearly visible in the foreground, as is BNSF locomotive #3828 and 'slug' # 3956. The Co-Op Mill is clearly visible in the back ground. The Co-Op images in the photograph match the Birds Eye images in **Exhibit 10**. Appended to Kessler's March 21, 2007 Petition for Stay, and identified as Kessler's **Exhibit One**, are two additional photographs of this consist. Photograph five, shows the locomotive and 'slug' approaching the Frisco Co-Op turnout. Photograph six shows the locomotive and 'slug' actually on the Frisco Line just east of the Co-Op turnout.

B & C. TRAFFIC ON THE LINE AFTER SEPTEMBER 23, 2003

6. On September 22, 2005, Richard A. Batie, Manager, BNSF's Network Development Department, made the statement: "no local traffic has moved **on the line** for at least two (2) years prior to the date hereof." (Emphasis added.) In BNSF's February 12, 2008 Reply to Chairman Nottingham's Order, BNSF argued "Producers' Coop is served from the Red Rock **Subdivision** and has been for more than two years prior to filing of AB-6 Sub - No. 430." (Emphasis added.)

7 Kessler would argue identifying which BNSF subdivision provides local rail service to the Co-Op, **does not** address the question posed by Chairman Nottingham: Has any local traffic moved **on the line** during the two years prior to BNSF filing its abandonment exemption, or at any time thereafter? As Kessler's Exhibits 9, 10, 11 and 13 clearly depict, the Co-Op's spur is physically connected to the Frisco Line at Frisco Line MP 540.13, and **is not** physically connected to the Red Rock Line, nor to any other rail line.

8. Kessler's Exhibits One and 14, clearly show a BNSF consist **on the line**, show this consist being pushed on the Co-Op's spur, show the consist was left at the Co-Op's facility, show the power units leaving the Co-Op's spur, and show the power units back on the Frisco Line. Which BNSF subdivision performed this movement, is not relevant. What is relevant, is that a portion of the Frisco Line, which Line is the subject of this abandonment proceeding, was used to perfect delivery of a number of rail cars to a shipper that is located on the Frisco Line. Furthermore, this portion of the Frisco Line provides the only rail access to the Co-Op mill.

9 Kessler would argue the photographic and image evidence he has presented to the Board irrefutably demonstrates the Co-Op shipper is located on the Frisco Line, the only rail access to the Co-Op is via the Frisco Line, and that BNSF has continued to use the Frisco Line to service the Co-Op. Kessler would further argue this evidence proves BNSF's Abandonment Exemption contains false and misleading statements, namely that "no local traffic moved on the line for at least two (2) years prior to the date hereof." If the Board desires additional evidence, Kessler would ask that the Board institute a discovery procedure so that Kessler may obtain waybill information for the Co-Op, and depose the individuals who operate the Red Rock Subdivision, to verify that BNSF uses the Frisco Line to access the Co-Op.

D. IDENTIFYING MARKS ON KESSLER'S PHOTOGRAPHS

10. The two photographs in Kessler's **Exhibit One** clearly show the Co-Op mill in the background. To verify this, the reader should consult the Birds Eye images in Kessler's **Exhibit 10**. The photograph in Kessler's **Exhibit Two** clearly shows the Chase Bank building in the background. This building is also visible in Kessler's **Exhibit 13**.

E. REMOVAL OF UNION PACIFIC DIAMOND

11. BNSF's August 22, 2005 letter to Jim Hatt discussed the removal of the Union Pacific diamond which permitted BNSF to cross over Union Pacific's tracks when providing rail service to Mid-States Lumber Company. This diamond is visible in Exhibit 11, an aerial view of the Co-Op, Mid-States Lumber Company, and spurs servicing those facilities. Exhibit 12, an image taken in 2007, shows the diamond has been removed, as per BNSF's August 22, 2005 letter. BNSF's September 23, 2005 letter references the cost of transloading Mid-States inbound rail traffic, due to BNSF's inability to provide rail service to Mid-States Lumber Company after the Union Pacific diamond was removed.

F. BNSF AUGUST 22, 2005 LETTER TO JIM HATT

12. In its February 12, 2008 Reply to Chairman Nottingham's Order, BNSF avoided addressing Chairman Nottingham's Order to address the substance of BNSF's August 22, 2005 letter to Jim Hatt by glibly saying it "has nothing to do with this case, as it deals with a different track." This case concerns the Frisco Line between MP 539.96 and MP 542.91, and all shippers located thereon. The Mid-States Lumber Company's spur connected to the Frisco Line at MP 540.10, which is on that portion of the Line BNSF sought abandonment authority for. Prior to the Board granting BNSF authority to abandon the Frisco Line, BNSF removed the diamond portion of Mid-States Lumber Company's spur. In exchange for Mid-States' acquiescence to the loss of its direct rail service, Oklahoma's Department of Transportation ("ODOT") agreed to pay the cost of transloading Mid-States' inbound lumber at a remote site, then trucking the inbound lumber to Mid-States' site. Prior to BNSF discontinuing direct rail service to Mid-States, BNSF provided ODOT with an estimate of what those transloading costs were likely to be. Based on BNSF's prior rail delivery service to Mid-States, which, according to the September 23, 2005 letter averaged two cars per month, BNSF estimated the transloading / trucking costs would be about \$22,800.00 per year. While the September 23, 2005 letter does not specifically state over what period of time the average was computed, it would not be credible for BNSF to argue the average was for a period of time prior to 2003. If Mid-States had not availed itself of any rail service for the two-year period of time prior to 2003, why would ODOT consent to pay for a

service that had not been performed for over two years? Once again, Kessler would ask that the Board permit discovery, so that Kessler can ask BNSF to provide waybills involving the Mid-States Lumber Company during the two year period prior to September, 2005. In the alternative, the Board could order BNSF to answer the question: Did Mid-States Lumber Company receive any rail service between September 23, 2003 and September 22, 2005? From a practical point of view, if the Board finds that the rail service that has been, and continues to be, provided to Co-Op from the Frisco Line, falls within the ambit of "local traffic has moved on the line," then there would be no need to adduce additional evidence showing BNSF's Abandonment Exemption contains "false or misleading statements."

13. BNSF continues to attempt to side-step the issue before the Board: Does BNSF's Abandonment Exemption contain "false or misleading statements?" The opposing parties in this proceeding have been arguing from the inception of this proceeding, that BNSF's Abandonment Exemption does contain "false or misleading statements," specifically, that contrary to what BNSF has averred, local traffic has moved over the Line, not only in the two-year period of time prior to BNSF filing its Abandonment Exemption, but during the 2 ½ years following the filing of its Abandonment Exemption. Kessler would argue that any evidence which brings into question the truthfulness of BNSF's statements in its Abandonment Exemption, is admissible at any time, for petitions to revoke may be filed at any time.

14. The facts are irrefutable: BNSF has provided, and continues to provide, rail service to the Producers Co-Op Oil Mill. The only way to access the Co-Op spur, is to traverse over a portion of the Line which is the subject of this abandonment proceeding. These facts present a legal question: Does the movement of rail cars over a portion of the Line, in order to access a spur that is connected to the Line, constitute "movement of local traffic on the line." If it does, then the condition precedent for BNSF's Abandonment Exemption has not been met, and BNSF's Abandonment Exemption must be rejected.

15. In *CSX Corporation and CSX Transportation, Inc. v. Norfolk Southern Corporation and Norfolk Southern Railway Company – Control and Operating Leases / Agreements – Conrail, Inc. and Consolidated Rail Corporation*, STB Finance Docket No. 33388 (Sub-No. 100), the

Board found that Conrail did not have the authority to serve Bridgewater Resources, Inc , a shipper located on a spur that connected to the Royce Spur, which in turn connected to the Lehigh Line at a point that was about 92 feet past the New Jersey Shared Assets Area boundary point on the Lehigh Line. Even though Conrail would have had to operate over less than one hundred feet of the Lehigh Line to gain access to the Royce Spur, the Board held the Line belonged to Norfolk Southern, and consequently, Conrail did not have the right to operate over those few feet to gain access to a track that Conrail would have had the right to operate on. Kessler would argue the same principle applies in this proceeding. Even though BNSF need only operate over a few hundred feet of the Frisco Line in order to gain access to the Co-Op spur, operation over those few hundred feet would constitute "local traffic on the line." And if operation by BNSF on a few hundred feet of the Frisco Line does constitute "local traffic on the line," then BNSF's representation that there has been no "local traffic on the line for the two years prior to the date hereof," is false or misleading.

16. WHEREFORE, for the reasons stated above, and in previous filings, Kessler would ask that the Board

- A. Revoke BNSF's Abandonment Exemption which provided BNSF authority to abandon the Line,
- B. On its own motion, the Board may wish to grant BNSF an individual exemption, granting BNSF authority to abandon the Line;
- C. Permit the Offer of Financial Assistance ("OFA") procedures to commence,
- D. Grant Kessler's request to stay the date by which an OFA must be submitted, until 30 days after BNSF provides Kessler with the statutorily mandated information Kessler has requested; and
- E. For such other relief as would be just and appropriate.

Respectfully,


Edwin Kessler

CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of February, 2008, a copy of the foregoing Response of Edwin Kessler to Reply of BNSF to February 7, 2008 Chairman Order, was served by first class mail, postage prepaid, upon the parties of record noted below.



Edwin Kessler

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Postscript:

The reader is encouraged to visit. www.Maps Live Com. [You must have Microsoft Windows to utilize this Web Site It will not work with an Apple computer.]

Once there, type, in the "Business or location" field, an address you wish to look at
Press your "return" key.

Click on the "aerial" or "hybrid" icon. [Experiment using both and using zoom function]

Zoom in a bit. Use the Pan function to center the location you want to look at, in the middle
of your screen.

Click on the "Birds Eye" icon.

Pan around a bit using the pan function

Click on the "camera rotate" function, to view a structure / location from a different
prospective Using the "camera rotate" function, you can view all four sides of a
structure. Experiment a bit

As you pan, you will encounter a "black" area adjacent to the image you are looking at That
"black" area represents another image from a slightly different prospective Pan further
and the "black" area will fill with another image. If you print images from two different
image locations, the images will not match, due to a change in scale, and a change in
image prospective.

Enjoy!

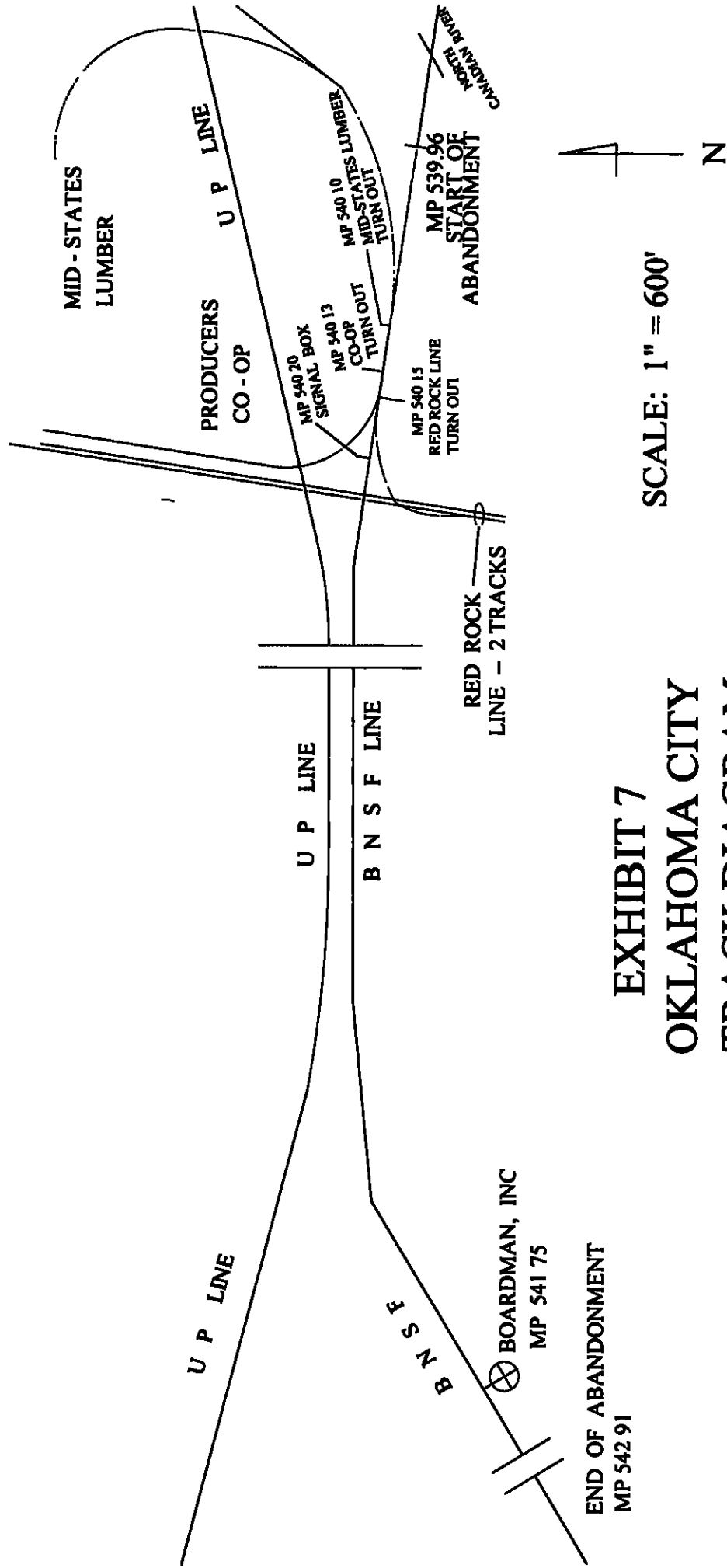


EXHIBIT 7 OKLAHOMA CITY TRACK DIAGRAM

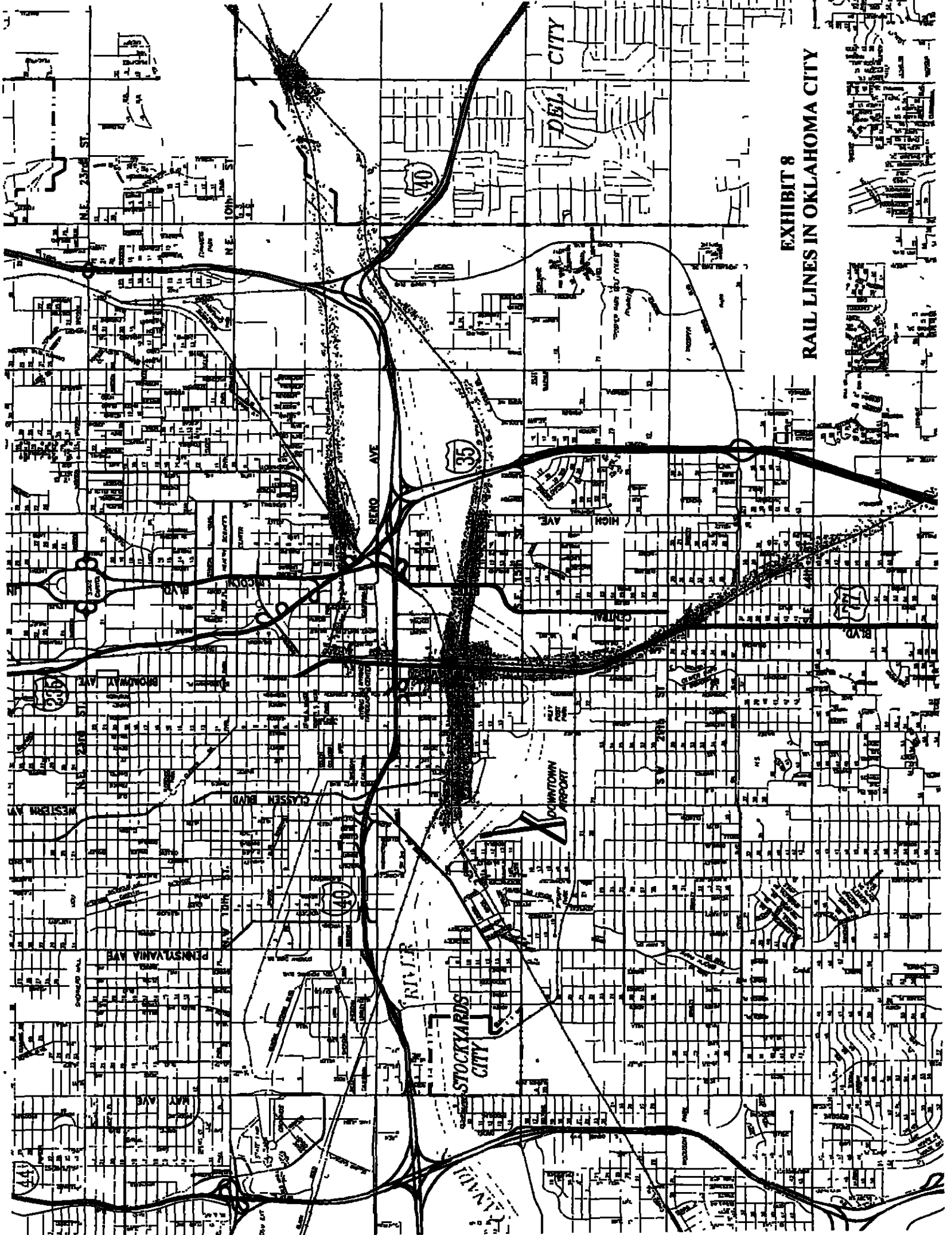


EXHIBIT 8
RAIL LINES IN OKLAHOMA CITY



Close up of Coop delivery ramp switch, out, on Red Rock subdivision



Close up of turnouts from former Frisco to Coop Delivery Lead & Red Rock Sub Interchange

DATE: 10/1/83
BY: [illegible]

BNSF RED ROCK LINE

MID-STATES LUMBER

Former Red Rock Ramp Spur

Co-Op rail cars

PRODUCERS CO-OP MILL

EXHIBIT II

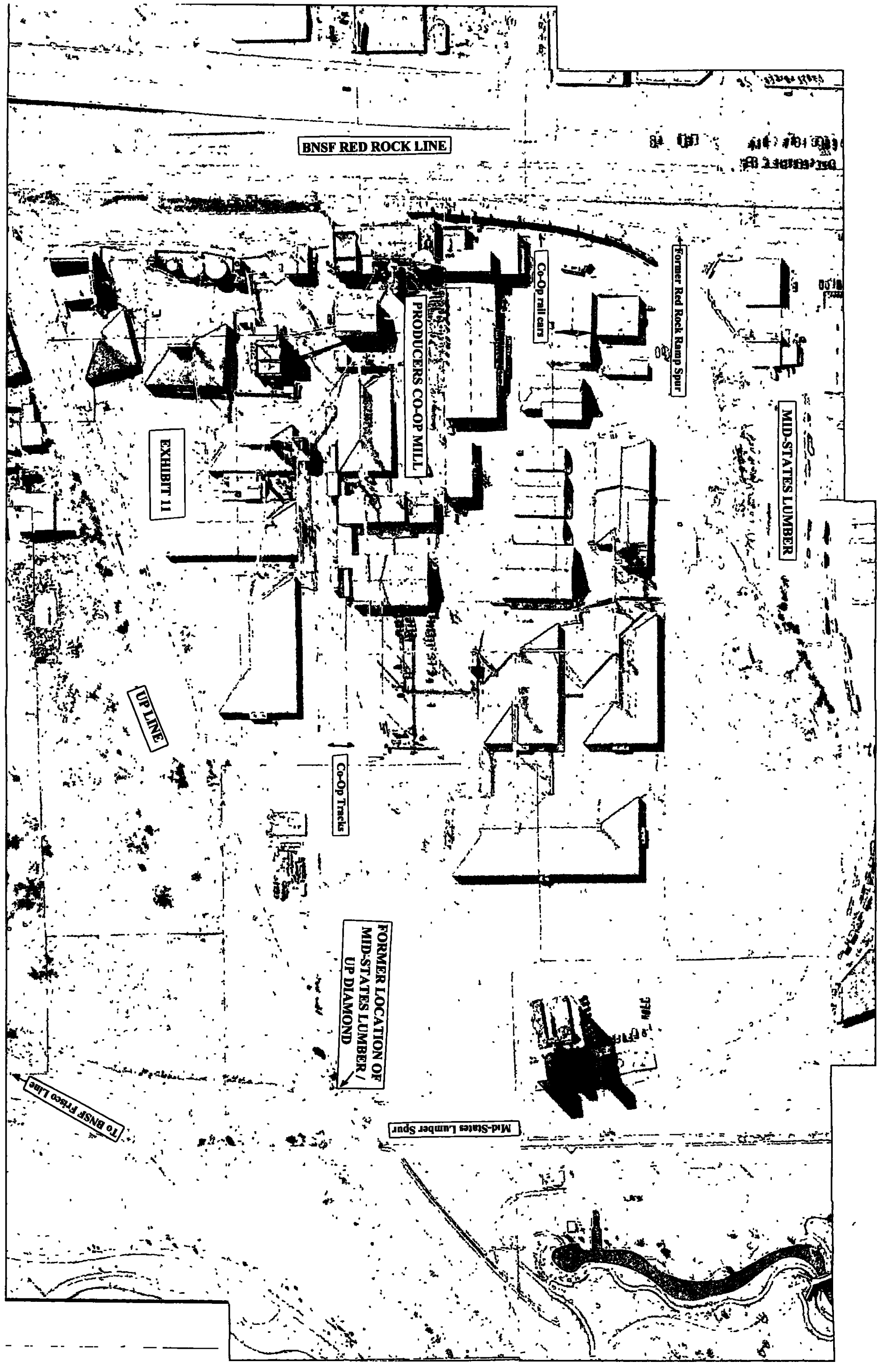
UPLINE

Co-Op Tracks

FORMER LOCATION OF
MID-STATES LUMBER /
UP DIAMOND

Mid-States Lumber Spur

To BNSF Frisco Line





New Canadian River

BNSF line which connects to Frisco Line at MP 540.10

To: Frisco Line →

Mid-States Lumber Spur →

Relocated UP line
Relocated circa 9 / 2005

EXHIBIT 12
FORMER LOCATION OF
MID-STATES LUMBER /
UP DIAMOND

4 N

Original UP line location →

Original UP line location →

Mid-States Lumber Spur
To: Mid-States Lumber

Former location of
Mid-States Lumber Spur /
UP line Diamond
Removed circa 9 / 2005

Producers Co-Op Oil Mill



**EXHIBIT 13: RAMP FROM RED ROCK LINE TO UNIDENTIFIED SHIPPER
NORTH OF PRODUCERS' CO-OP OIL MILL**

VERIFIED AFFIDAVIT OF THOMAS ELMORE
February 17, 2008

1 I am over the age of eighteen and am competent to testify to the matters stated in this Affidavit

2. On the afternoon of February 14, 2008, at approximately 2 10 p m in Oklahoma City, Oklahoma, I observed and photographed the BNSF rail access ramp right of way descending northward to ground level to the Producers Coop oil mill at 6 SE 4th Street from the eastern edge of the elevated BNSF Red Rock Subdivision right of way I noted that there is no track on this ramp, and no switch connected to any of the north-south Red Rock Subdivision tracks at the top of the elevation, rendering rail access to Producers Coop service tracks from the elevated Red Rock tracks impossible

I SOLEMNLY AFFIRM under the penalties of perjury and upon personal knowledge that the contents of the foregoing Affidavit are true and correct to the best of my knowledge and belief

Thomas Elmore 2-17-08
Thomas Elmore Date

STATE OF OKLAHOMA, Oklahoma COUNTY, to wit

I HEREBY CERTIFY, that on this 17th day of February, 2008
before me, a Notary Public of said State, personally appeared Thomas Elmore, known to me or satisfactorily proven to be the person whose name is subscribed to the within Affidavit, and who acknowledged that he executed the same, for the purposes therein contained

AS WITNESS my hand and notarial seal

My commission expires

5/7/2011

Lynne Engstrom
Notary Public

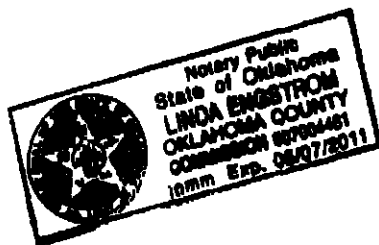




EXHIBIT 14 - 1: BNSF CONSIST ON FRISCO LINE AT MP 540.20 ON 2-27-07



EXHIBIT 14 - 2: BNSF CONSIST ON FRISCO LINE AT MP 540.20 ON 2-27-07

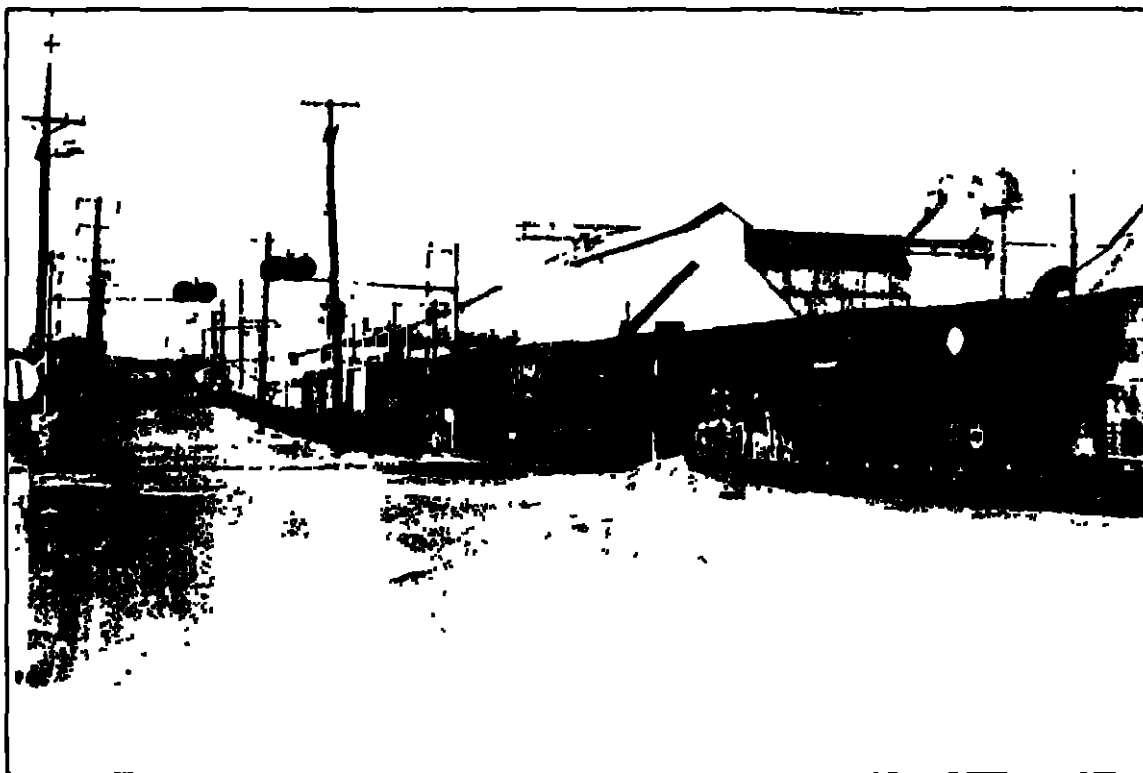


EXHIBIT 14 - 3: BNSF DELIVERING CONSIST ON CO-OP SPUR ON 2-27-07

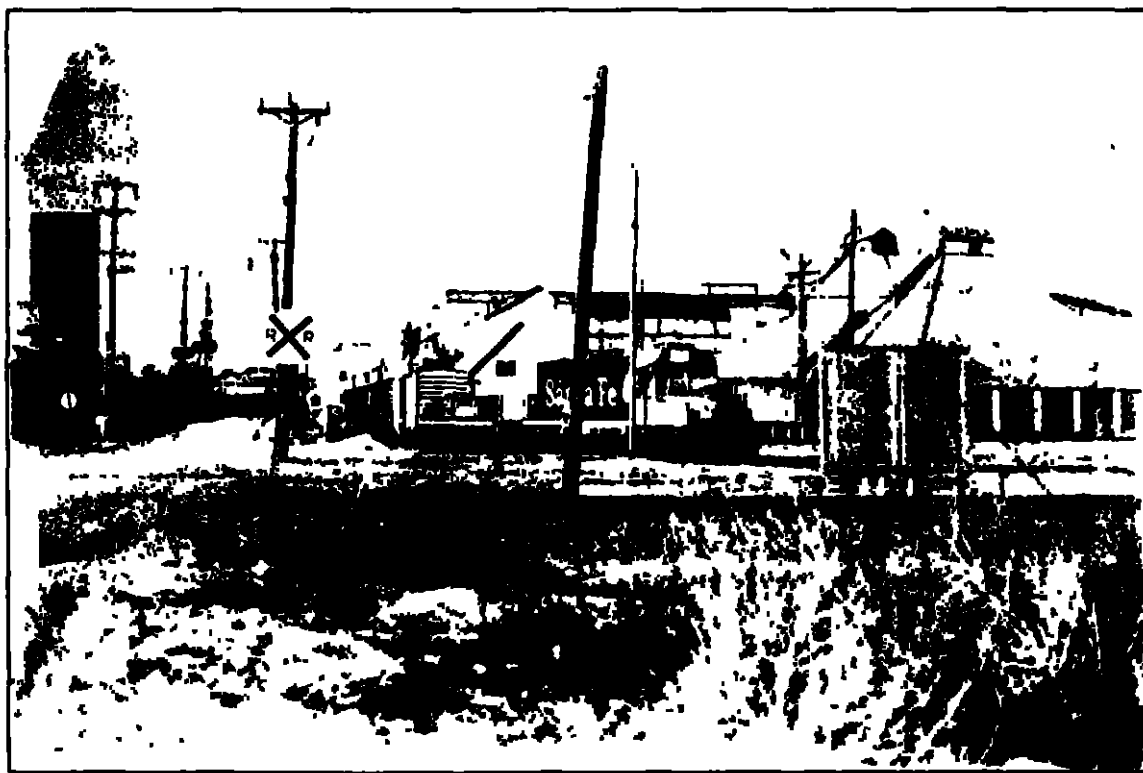


EXHIBIT 14 - 4: BNSF DELIVERING CONSIST ON CO-OP SPUR ON 2-27-07



EXHIBIT 14 - 5: BNSF LOCOMOTIVES LEAVING CO-OP SPUR ON 2-27-07

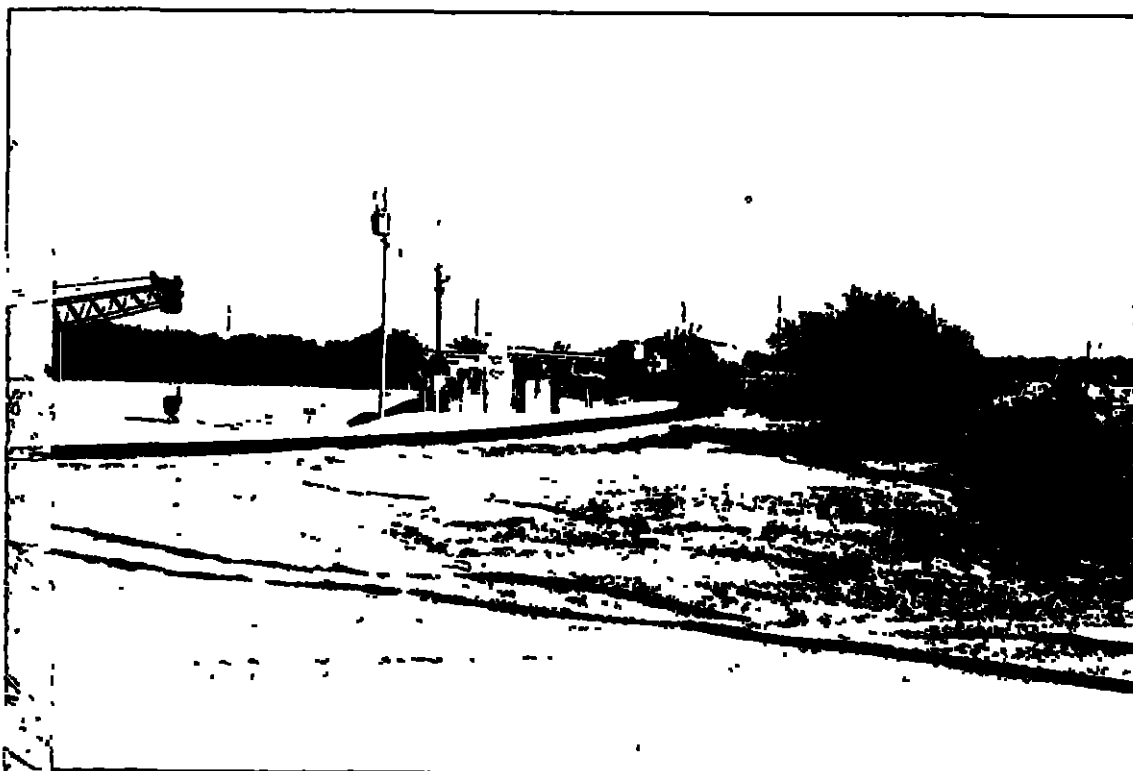


EXHIBIT 14 - 6: BNSF LOCOMOTIVES ON FRISCO LINE AFTER LEAVING CO-OP SPUR ON 2-27-07

VERIFIED AFFIDAVIT OF THOMAS ELMORE
February 17, 2008

1 I am over the age of eighteen and am competent to testify to the matters stated in this Affidavit.

2 On the afternoon of February 27, 2007, in Oklahoma City, Oklahoma, I observed and photographed a BNSF crew using BNSF Engine 3828 with accompanying BNSF traction slug 3956 to switch freight cars from the BNSF, former Frisco, rail line near Mile Post 540 20 into the Producers Coop oil mill yard located at 6 SE 4th Street. The rail line from which the switching was being done is the subject of STB Docket Number AB-6 430X, Case Title BNSF RAILWAY COMPANY -- ABANDONMENT EXEMPTION -- IN OKLAHOMA COUNTY, OK. Examples of the photos I shot at that time accompany this Affidavit. I shot other photos at that time, as well, which are not included with this document.

3 I first observed the train described on the date specified in Item 2 of this Affidavit partially blocking the Santa Fe Avenue railway crossing at Mile Post 540 20 on the BNSF, former Frisco, line. Motive power was at the east end of the train, trailing, first, two tank cars, followed by a string of boxcars back to the west. After the tank cars were uncoupled and cleared from the line, the string of boxcars was then recoupled to the locomotive set and drawn east along the BNSF, former Frisco, line, until clearing the Producers Coop delivery lead switch at approximately MP 540 13. The train of boxcars was then backed north on the Coop delivery lead, disappearing behind plant buildings. Shortly thereafter, the locomotive / slug lashup re-emerged without any rail cars from the Coop yard, proceeding back beyond the delivery lead switch and onto the BNSF, former Frisco, main line.

I SOLEMNLY AFFIRM under the penalties of perjury and upon personal knowledge that the contents of the foregoing Affidavit are true and correct to the best of my knowledge and belief.

Thomas Elmore 2-17-08
Thomas Elmore Date

STATE OF OKLAHOMA, Oklahoma COUNTY, to wit:

I HEREBY CERTIFY, that on this 17th day of February, 2008, before me, a Notary Public of said State, personally appeared Thomas Elmore, known to me or satisfactorily proven to be the person whose name is subscribed to the within Affidavit, and who acknowledged that he executed the same, for the purposes therein contained.

AS WITNESS my hand and notarial seal

My commission expires 5/7/2011

Linda Engstrom
Notary Public

